

20 PAGES

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
(SACRAMENTO DIVISION)

In re	) Lead Case No. 10-39672 (MSM)
MATTERHORN GROUP, INC.,	) (Jointly Administered with Nos. 10-39664
Debtor.	) (MSM) and 10-39670 (MSM)
	) )
VITAFREEZE FROZEN CONFECTIONS,	) DC No. LNB-17
INC.,	) )
Debtor.	) Chapter 11 Case
	) )
DELUXE ICE CREAM COMPANY,	) <b>MEMORANDUM OF POINTS AND</b>
Debtor.	) <b>AUTHORITIES IN SUPPORT OF UNIONS'</b>
	) <b>JOINT MOTION TO WITHDRAW THE</b>
	) <b>REFERENCE OF DEBTORS' MOTION TO</b>
	) <b>MODIFY OR REJECT COLLECTIVE</b>
	) <b>BARGAINING AGREEMENTS WITH THE</b>
	) <b>BAKERY, CONFECTIONERY, TOBACCO</b>
	) <b>WORKERS AND GRAIN MILLERS'</b>
	) <b>INTERNATIONAL UNION LOCAL NO. 85</b>
	) <b>AND GENERAL TEAMSTERS LOCAL 324</b>
	) <b>28 U.S.C. § 157 (d)</b>
	) )
	) DATE:
	) TIME: .
	) PLACE: U. S. District Court
	) 501 "I" Street
	) Sacramento, CA 95814
	) )
	) Judge:
	) )

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9 UNITED STATES DISTRICT COURT

10 EASTERN DISTRICT OF CALIFORNIA (SACRAMENTO DIVISON)

11 In re ) Case No.  
12 MATTERHORN GROUP, INC., )  
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18 Debtor. )  
19 ) MEMORANDUM OF POINT AND  
20 ) AUTHORITIES IN SUPPORT OF UNIONS'  
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25 ) BAKERY, CONFECTIONERY, TOBACCO  
26 ) WORKERS AND GRAIN MILLERS'  
27 ) INTERNATIONAL UNION LOCAL NO. 85  
28 ) AND GENERAL TEAMSTERS LOCAL 324  
29 ) 28 U.S.C. § 157(d)  
30 )  
31 )  
32 DELUXE ICE CREAM COMPANY, ) DATE: TBA  
33 Debtor. ) TIME: TBA  
34 ) DEPT: TBA  
35 ) PLACE: 501 "I" Street  
36 ) Sacramento, CA 95814  
37 )  
38  Affects ALL DEBTORS )  
39  Affects only MATTERHORN GROUPS, INC. ) Judge:  
40  Affects only VITAFREEZE FORZEN )  
41 CONFECTIONS, INC. )  
42  Affects only DELUXE ICE CREAM COMPANY )  
43 )

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## **I. INTRODUCTION**

Bakery Workers Local 85 and Teamsters Local 324 (collectively the “Unions”) jointly move for withdrawal of the reference of the Debtors’ motion to reject their collective bargaining agreements (the “Rejection Motion”). Withdrawal of the reference of the Rejection Motion falls within the withdrawal of reference statute, 28 U.S.C. § 157(d), because “resolution . . . requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.”<sup>1</sup> The Rejection Motion was filed October 11, 2010 as a contested matter in the bankruptcy court for this District and Division by the chapter 11 debtor, Matterhorn Group, Inc. (“Matterhorn” or “Debtors”), with a hearing set for October 25.<sup>2</sup> The Rejection Motion seeks to reject all three of Matterhorn’s collective bargaining agreements (“CBAs”) pursuant to Section 1113 of the Bankruptcy Code (“§ 1113 herein”).<sup>3</sup>

Resolution of the Rejection Motion will require consideration of at least four federal non-bankruptcy labor statutes, in tandem with § 1113 of the Bankruptcy Code:

- 14           (1) The National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 157-159 (rights and  
15 obligations of employers, successor employers, employees, and unions, both before and after a  
16 collective bargaining agreement expires or is rejected);  
17           (2) The Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185 et seq.  
18 (interpretation of collective bargaining agreement);  
19           (3) The Employee Retirement Income and Security Act (“ERISA”) 29 U.S.C. §§ 1001  
20 et seq. (providing for, inter alia, contributions to be made in accord with trust agreements and  
21 assessment of withdrawal liability against an employer that withdraws from a multi-employer  
22 pension plan); and  
23           (4) The Norris-LaGuardia Act (“NLA”), 29 U.S.C. § 104 (federal courts shall not  
24 enjoin any “parties to a labor dispute” except in narrowly defined conditions not found here.

Because these federal labor statutes must be considered in tandem with the Bankruptcy Code, the Rejection Motion is subject to both permissive and mandatory withdrawal of reference

<sup>1</sup> 28 U.S.C. § 157(d) (second sentence).

<sup>2</sup> Docket Number 277 in bankruptcy case number 10-39672 (MSM), Eastern District of California.

<sup>3</sup> 11 U.S.C. § 1113.

1 under the relevant provision of the Judiciary Act.<sup>4</sup> As explained below, the Rejection Motion  
2 cannot be resolved without substantial, in-depth consideration of these non-bankruptcy statutes,  
3 which continue to apply to the Debtors.

4       The federal issues intertwining bankruptcy, federal labor, and jurisdictional questions  
5 should be before this District Court for disposition – including determining if any matters should  
6 be referred to the National Labor Relations Board (“NLRB”) for decision, because of its exclusive  
7 jurisdiction under the NLRA and the LMRA. Thus, the issues for this Court include whether the  
8 determinations sought in the Rejection Motion are precluded by any or all of the above mentioned  
9 statutes.

10      This Court should withdraw the reference under 28 U.S.C. § 157(d),<sup>5</sup> to determine the  
11 issues presented with the Rejection Motion. The merits of the Debtors’ Rejection Motion are not  
12 now before this Court.

13      No delay has or will result from withdrawal of reference, as Matterhorn filed its Rejection  
14 Motion on October 11, 2010, and this motion to withdraw reference has been timely made, as the  
15 bankruptcy court has not begun taking testimony. No party will suffer prejudice as a result of  
16 granting this motion, which would allow the matter to be heard for the first time in the proper  
17 forum and thereby avoid unnecessary appeals and/or further proceedings. The interests of justice  
18 and judicial economy also suggest the District Court should decide whether the NLRB is the  
19 proper forum to determine the intertwined federal bankruptcy and non-bankruptcy issues  
20 presented, or any of them. Withdrawal of reference is commonly granted where the action is non-  
21 core, not involving bankruptcy administration of estate property, and not all parties have consented  
22 to final orders and judgment by the bankruptcy judge.<sup>6</sup> That is the situation here.

23           **II.       QUESTIONS PRESENTED FOR DECISION**

24      1.       Whether withdrawal of reference is mandatory or proper of the Debtors’ motion for  
25 modification or rejection their CBAs with the Unions in order to enable a potential purchaser  
26

27           

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<sup>4</sup> See 28 U.S.C. § 157(d), compare first sentence, “for cause” with second sentence, “shall.”

28           <sup>5</sup> A motion for withdrawal of reference “shall be heard by the district judge.” Rule 5011(a),  
Federal Rules of Bankruptcy Procedure.

28           <sup>6</sup> The Unions have not consented to final orders and judgment by the bankruptcy court.

1 (including Matterhorn's CEO) to avoid legal obligations a successor employer may have under the  
2 NLRA and the LMRA.<sup>7</sup>

3       2. Whether the District Court should withdraw the reference to determine whether  
4 rejection of CBAs may be ordered on account of a sale of the Debtors' assets.

5       3. Whether the District Court should withdraw the reference to consider whether filing  
6 the bankruptcy eliminated any of the Debtors' obligations under the NLRA to bargain with the  
7 Unions.<sup>8</sup>

8       4. Whether the District Court should withdraw the reference to determine whether the  
9 Debtors improperly seek to reject the CBAs for the purpose of avoiding to any degree their  
10 statutory withdrawal liability under ERISA, 29 U.S.C. § 1381 *et seq.*, a multi-million dollar  
11 obligation.<sup>9</sup>

12       5. Whether the District Court should withdraw the reference to determine whether the  
13 Norris LaGuardia Act ("NLA") precludes a federal court from ordering a CBA no-strike clause to  
14 be continued through 2020, or otherwise ordering any modifications sought improperly by the  
15 Rejection Motion.<sup>10</sup>

16       6. Whether the District Court should withdraw the reference to decide whether the  
17 Bankruptcy Court should be precluded from considering the representational rights of the Unions  
18 under the NLRA after rejection of the CBA.

19       ///

20       ///

21       

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<sup>7</sup> The Rejection Motion itself shows that representational issues under federal labor law are at  
22 issue. *See* Unions' Joint Opposition at 8 and references to record there (attached to Declaration of  
23 Emily P. Rich in Support of Unions' Joint Motion to Withdraw the Reference ("Rich Decl.") as  
Exh. 3 filed herewith).

24       <sup>8</sup> The Debtors refused to bargain about certain decisions and acts taken before proposing  
modifications to the Unions, the Debtors' decision to withdraw from participation in both multi-  
25 employer pension plans covering Union workers, their decision to sell all assets, and their refusal  
to make certain scheduled pay increases, pension contributions, and health plan contributions under  
the CBAs.

26       <sup>9</sup> The Bakery and Confectionery Union & Industry Pension Fund alone estimates withdrawal  
liability of some \$4.4 million to help guarantee pensions of workers at the Vitafreeze facility in  
Sacramento. A figure is not yet available for the Western Conference Teamster Plan and Trust  
covering workers at the DeLuxe Ice Cream facility in Salem, Oregon.

27       <sup>10</sup> The bankruptcy court has no authority to order CBA modification, except for the strictly limited  
"interim" period mentioned in § 1113(e), something not raised at all in the Rejection Motion.

1           7.     Whether the District Court should withdraw the reference to decide whether the  
2 Unions have good cause to reject the Debtors' proposals for modifications of the CBAs.

3           **III. PROCEDURAL FACTS AND BACKGROUND**

4           A labor dispute exists between the movants, two Unions representing workers employed at  
5 the two production facilities operated by the bankrupt companies, Matterhorn Group, Inc. and two  
6 subsidiaries, Vitafreeze Frozen Confections, Inc, and DeLuxe Ice Cream Company. The three  
7 bankrupts (collectively referred to as "Matterhorn" or the "Debtors") filed a motion to modify or  
8 reject collective bargaining agreements, the "Rejection Motion," on October 11, 2010.<sup>11</sup> The  
9 motion seeks rejection of CBAs with two Unions, Bakery Workers Local 85 at Vitafreeze, in  
10 Sacramento, and Teamsters Local 324 at DeLuxe Ice Cream, in Salem, Oregon. The Unions filed  
11 their Joint Opposition on October 18, 2010. Exh. 3 to Rich Decl., filed herewith.

12           The Unions jointly bring this Motion in order to have the Debtors' Rejection Motion  
13 withdrawn from bankruptcy court and decided here by an Article III court because of the non-  
14 bankruptcy federal labor laws presented that require substantial consideration. While the Rejection  
15 Motion appears defective on the merits and to fail under the strict mandates of 11 U.S.C. § 1113,  
16 the embedded labor issues are dispositive and call for withdrawal of reference on both mandatory  
17 and permissive grounds of 28 U.S.C. § 157(d). The Unions also seek a stay of proceedings on the  
18 Rejection Motion until this Court has decided whether to withdraw the reference. See Application  
19 To Shorten Time To Hear Motion For Withdrawal Of The Reference And Request For Stay Of  
20 Bankruptcy Hearing Pending Order Of This Court, filed herewith.

21           The background sequence of events shows that before Matterhorn made any proposals for  
22 CBA modifications, it had already decided to attempt CBA rejection, it had already openly  
23 breached the CBAs and stopped performing its pension obligations, and it refused to bargain in  
24 good faith. Such violations are grounds to deny the Rejection Motion, and close application of  
25 federal labor laws in tandem with the Bankruptcy Code is thus required to resolve the matter.

26  
27           <sup>11</sup> Debtors' Memorandum of Points and Authorities in Support of Debtors' Motion to Modify or  
28 Reject Collective Bargaining Agreements ("Debtors' § 1113 MPA") is attached to Rich Decl.  
herein as Exh. 1. Exhibits to Debtors' Memorandum of Points and Authorities in Support of  
Debtors' Motion to Modify or Reject Collective Bargaining Agreements (Exhs. to Rejection  
Motion") is attached to Rich Decl. herein as Exh. 2.

1           The Unions' Joint Opposition to the Rejection Motion<sup>12</sup> shows that:

2           Debtors have instituted at least two unilateral changes to the CBAs—changes which are  
3 subject to mandatory bargaining under federal law. Debtors unilaterally ceased all pension  
4 contributions to the Trust Funds of both Unions, covering all of the workers under the three  
5 Collective Bargaining Agreements.<sup>13</sup> Debtors also refused to institute August 1, 2010 wage  
6 increases as required by the Local 324 Operators CBA and the Local 324 Palletizers CBA.<sup>14</sup>

7           Debtors sent a proposal to the Bakery Workers Local 85 on August 29, 2010, mistakenly  
8 proposing to modify a previous CBA. Local 85 requested information about the proposed  
9 modifications, which request was never answered.<sup>15</sup>

10          The Debtors sent proposals to the Teamsters Local 324 on September 22, 2010. Teamsters  
11 Local 324 requested information to evaluate the necessity of the proposals. Debtors responded to  
12 this information request (after already filing the Rejection Motion) in a vague, ambiguous manner  
13 if at all (for example, answering questions that specifically asked for financial impact without  
14 providing financial figures). For the Palletizers CBA information request, Debtors only responded  
15 to one question out of nineteen. (Q: Why is this change [removal] to the union security article  
16 necessary? A: To allow for all potential employees to make their own decision as to whether they  
17 want to make contributions to the union and become union members.”)<sup>16</sup>

18          Both the Bakery Local 85 and the Teamsters Local 324 requested detailed information  
19 about the potential purchasers of the Debtors' assets. The Debtors responded, but did not provide  
20 any information related to potential purchasers.<sup>17</sup>

21          On September 20, the Debtors met with representatives of Local 85, but Debtors adjourned  
22 the meeting stating that they were not prepared to address certain issues, including the effect of

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23          <sup>12</sup> Exh. 3 to Rich Decl.

24          <sup>13</sup> See Partial Transcript of 9/2/2010 Creditors' Meeting at 10, Exhibit A to Gottesman Decl. (the  
25 entire Gottesman Decl., which supports the Unions' Joint Opposition to the Rejection Motion, is  
attached as Exh. 4 to the Rich Decl. filed herewith).

26          <sup>14</sup> Exhibit A to Gottesman Decl. at 10 (Exh. 4 to Rich Decl.); Exhibit 2 to Exhibits to Rejection  
Motion at 43 (Rich Decl. herein Exh. 2); Exhibit 3 to Exhibits to Rejection Motion at 72 (Rich  
Decl. herein Exh. 2).

27          <sup>15</sup> Exhibits to Rejection Motion at Exhibit 4 (Exh. 2 to Rich Decl. herein); Exhibit B to Gottesman  
Decl. (Exh. 4 to Rich Decl. herein).

28          <sup>16</sup> Exhibit C & D to Gottesman Decl. (Exh. 4 to Rich Decl. herein).

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28          <sup>17</sup> Exhibits E & I to Gottesman Decl. (Exh. 4 to Rich Decl. herein).

1 withdrawal liability and the effect of successor obligations in the event of sale.<sup>18</sup> As a response to  
2 Debtors' unilateral ceasing to make pension contributions and failure to implement contractual  
3 wage increases, the Unions filed two Unfair Labor Practice Charges with the National Labor  
4 Relations Board.<sup>19</sup>

5 The three proposals sent to the Unions included non-economic issues, such as deletion of  
6 union representation provisions and elimination of seniority rights, in addition to cutting wages and  
7 health benefits and eliminating pensions. After Debtors already had ceased all pension  
8 contributions, Debtors then proposed elimination of pension contributions in all three CBAs.<sup>20</sup>  
9 Debtors proposed to reduce union health insurance contributions by 71% for Bakery Workers  
10 Local 85 members, by 70% for Teamsters Local 324 members, to eliminate health insurance  
11 completely for seasonal workers, and to eliminate dental insurance for all union members.<sup>21</sup> .

12 Debtors proposed hourly wage cuts of up to 54.8% for their union employees.<sup>22</sup>

13 Absent from these proposals was any modification to the "no-strike" provisions of all three  
14 contracts. Other than in their Rejection Motion, the Debtors have not presented either Union with  
15 the desire to extend the no-strike provision of the CBAs. In an October 4, 2010 hearing in this  
16 case, this Court stated that:

17 The evidence [the Debtors are] relying on for rejection needs to be in the  
18 motion. And if there's been further negotiations since the filing of the  
19 motion, then something is relevant, that's fine. I understand. But, Mr.  
Raisner wants to make sure when he gets the motion he knows why you  
think the contracts ought to be rejected or they ought to have the right to be  
rejected. And you satisfied the conditions to the filing of that motion.

21 Exhibit H to Gottesman Decl. (Exh. 4 to Rich Decl. herein).

22 ///

23 ///

24 \_\_\_\_\_  
18

25 Exhibit F to Gottesman Decl. (Exh. 4 to Rich Decl. herein).

19 Exhibit G to Gottesman Decl. (Exh. 4 to Rich Decl. herein).

20 Compare Exhibit 1 to Exhibits to Rejection Motion at 22-23 with Exhibit 4 to Exhibits to  
Rejection Motion at 98-100; Exhibit 5 to Exhibits to Rejection Motion at 133; Exhibit 5 to Exhibits  
to Rejection Motion at 156 (all Exhibits referenced in this footnote are part of Exh. 2 to Rich Decl.  
herein).

21 Debtors' § 1113 MPA 8:12-15, 15: 7-17, 19-25 (Exh. 1 to Rich Decl. herein).

22 See analysis in Unions' Joint Opposition at 7 and exhibits there referenced.

1           The Unions have been and are willing to meet and negotiate with the Debtors, and are  
2 willing to make serious economic concessions with respect to their CBAs.

3           The Debtors have not provided a plan for reorganization, but have stated that they are in a  
4 “dire” financial position. However, in a Creditors’ meeting held on September, 2, 2010, Nathan  
5 Bell, under oath, stated that the Debtors had a \$3 million dollar positive EBIDTA for 2009.  
6 Exhibit A to Gottesman Decl. at 2 (Exh. 4 to Rich Decl. herein). As late as June 2010, the Debtors  
7 had a \$400,000 positive EBIDTA. Id. Mr. Bell further stated that the Debtors have “a very solid  
8 business with a product that’s geographically viable,” that Mr. Bell has “not seen a single  
9 indication of drop in volume from [their] customers,” and that the Debtors’ customers have  
10 “remained loyal and stuck with [them].” Id. at 10-11.

11           Debtors’ CEO Nathan Bell has stated in negotiations with the Bakers Local 85 and in a  
12 Declaration that he and a team of investors are trying to purchase the Debtors’ assets. Decl. of Bell  
13 at ¶ 20 In Support Of Sale Motion, Filed Oct. 8, 200 [DOC # 269], attached as Exhibit J to  
14 Gottesman Decl. (Exh. 4 to Rich Decl. herein) (“I have previously made clear to both the Bank and  
15 the Creditors’ Committee that I, working alone or in conjunction with others, may be a bidder at  
16 the auction sale.”).

17           The Rejection Motion seeks modifications as well as rejection, although § 1113 does not  
18 permit a bankruptcy court to modify the CBAs. The Rejection Motion also seeks to impose a no-  
19 strike bar extending through the year 2020. Such an injunction against the Unions’ right to strike  
20 cannot be ordered because of the Norris LaGuardia Act’s strict rule preventing issuance of  
21 injunctions against parties to a labor dispute, with limited exceptions not found here.

22           **IV.        FEDERAL STATUTES AT ISSUE**

23           The following federal statutes must be considered to resolve the Rejection Motion to be  
24 withdrawn:

25           **A.        WITHDRAWAL OF REFERENCE, 28 U.S.C.§ 157(D).**

26           The Judiciary Act provides for withdrawal of reference in Section 157(d):

27           (d) The district court may withdraw, in whole or in part, any case or  
28 proceeding referred under this section, on its own motion or on timely  
motion of any party, for cause shown. The district court shall, on timely  
motion of a party, so withdraw a proceeding if the court determines that

1 resolution of the proceeding requires consideration of both title 11 and  
2 other laws of the United States regulating organizations or activities  
3 affecting interstate commerce.

4 A motion for withdrawal of reference must be determined by the district court, not a  
5 bankruptcy court. Rule 5011(a) of the Federal Rules of Bankruptcy Procedure states:

6 A motion for withdrawal of a case or proceeding shall be heard by a district  
7 judge.

8 **B. NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §§ 157-159.**

9 **§ 157.** Employees shall have the right to self-organization, to form, join,  
10 or assist labor organizations, to bargain collectively through  
11 representatives of their own choosing, and to engage in other concerted  
activities for the purpose of collective bargaining or other mutual aid or  
protection, and shall also have the right to refrain from any or all such  
activities except to the extent that such right may be affected by an  
agreement requiring membership in a labor organization as a condition  
of employment as authorized in section 158(a)(3) of this title.

12 **§ 158. (a) Unfair labor practices by employer**

13 It shall be an unfair labor practice for an employer--

14 (1) to interfere with, restrain, or coerce employees in the exercise of the  
15 rights guaranteed in 157 of this title;

16 (2) to dominate or interfere with the formation or administration of any  
17 labor organization or contribute financial or other support to it: Provided,  
18 That subject to rules and regulations made and published by the Board  
pursuant to section 156 of this title, an employer shall not be prohibited  
from permitting employees to confer with him during working hours  
without loss of time or pay;

19 (3) by discrimination in regard to hire or tenure of employment or any  
20 term or condition of employment to encourage or discourage  
21 membership in any labor organization: Provided, That nothing in this  
22 subchapter, or in any other statute of the United States, shall preclude an  
employer from making an agreement with a labor organization (not  
23 established, maintained, or assisted by any action defined in this  
subsection as an unfair labor practice) to require as a condition of  
employment membership therein on or after the thirtieth day following  
the beginning of such employment or the effective date of such  
agreement, whichever is the later, (i) if such labor organization is the  
representative of the employees as provided in section 159(a) of this  
title, in the appropriate collective-bargaining unit covered by such  
agreement when made, and (ii) unless following an election held as  
provided in section 159(e) of this title within one year preceding the  
effective date of such agreement, the Board shall have certified that at  
least a majority of the employees eligible to vote in such election have  
voted to rescind the authority of such labor organization to make such an  
agreement. . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**C. LABOR-MANAGEMENT RELATIONS ACT ("LMRA"), 29 U.S.C. §§ 141 ET SEQ.**

## § 185. Suits by and against labor organizations

#### (a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

**D. EMPLOYEE RETIREMENT INCOME SECURITY ACT (“ERISA”), 29 U.S.C. §§ 1001 ET SEQ.**

## Sec. 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

## Sec. 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section -

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted-

(A) first, by any de minimis reduction applicable under section 1389 of this title.

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title. . . .

1      E.     **NORRIS LAGUARDIA ACT (“NLA”), 29 U.S.C. § 104 (EXCERPTS).**

2                No court of the United States shall have jurisdiction to issue any  
3                restraining order or temporary or permanent injunction in any case  
4                involving or growing out of any labor dispute to prohibit any person or  
5                persons participating or interested in such dispute (as these terms are  
6                herein defined) from doing, whether singly or in concert, any of the  
7                following acts:

8                \* \* \*

9                (d) By all lawful means aiding any person participating or interested in  
10               any labor dispute who is ... prosecuting, any action or suit in any court of  
11               the United States or of any State. . . .

12                **V.        ARGUMENT**

13      A.     **SUMMARY OF NON-BANKRUPTCY LAWS AT ISSUE**

14                To resolve the Rejection Motion proceeding the Court must give substantial, in-depth  
15               consideration to four federal non-bankruptcy statutes, each of which must be considered in tandem  
16               with Bankruptcy Code provisions, especially § 1113. Those four federal statutes all continue to  
17               apply to the Debtors in bankruptcy, and the following overview suggests the serious level of  
18               analysis involved in determining precisely how federal labor law is to be squared with § 1113 and  
19               with the bankruptcy court’s jurisdiction.

20                **1.        The National Labor Relations Act (“NLRA”) and Unfair Bargaining**

21                The Debtors’ open and apparently willful refusal to comply with the CBAs, and their  
22               unilateral efforts to alter them implicate § 1113 and preclude their Rejection Motion from being  
23               granted. The leading bankruptcy treatise observes:

24                A trustee acts at great peril if the trustee fails to comply with a collective  
25               bargaining agreement, or takes unilateral action to change the terms of a  
26               collective bargaining agreement. Such actions violate both section 1113(f),  
27               and the NLRA. As a result, the potential exists for the filing of an unfair  
28               labor practice charge against the trustee before the NLRB.

29                7-1113 Collier on Bankruptcy P 1113.09.

30                Thus, it remains clear that § 1113 does not preclude the filing of an unfair labor practice  
31               charge. In fact, the Debtors’ conduct has already caused each of the Unions here to file an Unfair  
32               Labor Practice Charge with the NLRB. At the same time, some of the same issues may go before  
33               the bankruptcy court under § 1113(f) and must be decided with the Rejection Motion. A case

1 addressing the issue squarely holds that a debtor's noncompliance with the CBA will preclude  
2 rejection. *Birmingham Musicians' Protective Ass'n, Local 256-733 v. Ala. Symphony Ass'n* (in Re  
3 Ala. Symphony Ass'n), 211 B.R. 65, 69 (N.D. Ala. 1996).

4 A common NLRB remedy is a bargaining order, to "cease and desist from refusing to  
5 bargain," with specificity based on particular bargaining violations. See, e.g., *Power, Inc.*, 311  
6 NLRB 599 (1993), enforced, 40 F.3d 409 (D.C. Cir. 1994). Unilateral changes constituting  
7 unlawful refusal to bargain may lead to a bargaining order plus an order to restore the status quo  
8 ante, with employees to be made whole for any discontinued benefits. *Beacon Journal Publ'g Co.*  
9 v. NLRB, 401 F.2d 366 (6th Cir. 1968) and 417 F.2d 1060 (6th Cir. 1969).

10 The general question of how a bankruptcy court in Chapter 11 should regard orders from  
11 the NLRB has been settled since *Nathanson v. NLRB.*, 344 U.S. 25, 28-29 (1952), which held that  
12 the NLRB claim for backpay must be recognized as one to be paid from the bankruptcy estate.  
13 *Nathanson* remains good law.

14 The Ninth Circuit applied this approach in *N.L.R.B. v. Continental Hagen Corp.*,  
15 932 F.2d 828, 835 (9<sup>th</sup> Cir. 1991), where the NLRB filed a claim in the bankruptcy case.

16 Our action in this case, entering judgment in favor of the NLRB with respect  
17 to the backpay provision, does not negate the fact that actual enforcement of  
18 the backpay provision must take place through the Bankruptcy Court.

19 *Continental Hagen Corp.*, 932 F.2d at 835.

20 The bankruptcy court and this Court lack jurisdiction to review NLRB findings or remedial  
21 orders,<sup>23</sup> and courts of appeal will show great deference and "special respect" to NLRB remedies.  
22 See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 fn. 32 (1969).

23 **2. The Labor Management Relations Act ("LMRA")**

24 Federal courts have labor jurisdiction to enforce collective bargaining agreements under  
25 section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Federal courts have long  
26 exercised jurisdiction to interpret collective bargaining agreements, 29 U.S.C. § 185, and the

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<sup>23</sup> NLRB must apply to the appropriate court of appeals to enforce orders. See Labor Management Relations Act § (10(e), 29 U.S.C. § 160(e).

1 resulting extensive caselaw will need to be applied in resolving the Rejection Motion.

2 The pension plans covering workers under the Debtors' CBAs are regulated by the LMRA,  
3 29 U.S.C. § 186, as well as by ERISA.

4       **3. The Employee Retirement Income and Security Act ("ERISA")**

5 ERISA, 29 U.S.C. §§ 1001 – 1461, governs pension and other employee benefit plans in  
6 the private sector. The Debtors' CBAs here expressly require participation in multiemployer  
7 pension plans,<sup>24</sup> which have employer and employee trustees, and governed by their respective  
8 trust agreements, enforceable by ERISA. Fiduciary duties generally apply to property of the  
9 pension plans and to pension rights, and an employer may have a fiduciary duty respecting plan  
10 assets defined by the trust agreement.

11       At least two particular ERISA provisions have immediate relevance to the Rejection  
12 Motion. First, ERISA § 415, 29 U.S.C. 1145, requires contributions to be paid as required by a  
13 CBA. The Debtors' flat refusal to do so calls into question their ERISA liability for contributions  
14 due since July 1.<sup>25</sup> Secondly, ERISA 29 U.S.C. § 1381 provides for withdrawal liability to attach  
15 to an employer that withdraws from participation in a multiemployer pension plan. The Debtors  
16 announced their decision to withdraw from the pension plans at the outset of the bankruptcy and  
17 have made no contribution since then. The amount of the Debtors' withdrawal liability to just one  
18 of the plans, the Bakery Industry & Confectionery Union & Industry Pension Fund, covering Local  
19 85 members at Vitafreeze, is about \$4.4 million, some or all of which could have priority status as a  
20 claim. The amount of withdrawal liability to the Western Conference of Teamsters Pension Trust  
21 Fund is not known to the undersigned but will represent an allocable share of unfunded vested  
22 pension liability.

23       These ERISA liabilities of the Debtors have relevance to the § 1113 standard that the  
24 Debtors' proposals (which include deletion of pension obligations from the CBAs) each is  
25 "necessary to permit the reorganization of the debtor" and "assures that all creditors, the debtor and

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<sup>24</sup> The Bakery Industry & Confectionery Union & Industry Pension Fund, covering Local 85 at  
27 Vitafreeze. Western Conference of Teamsters Pension Trust Fund, covering Local 324 members at  
Deluxe Ice Cream.

<sup>25</sup> See Gottesman Decl. Exh. A at 16 (testimony under oath by CEO Nathan Bell at Creditors'  
Meeting) (Exh. 4 to Rich Decl. herein).

1 all of the affected parties are treated fairly and equitably.” See 11 U.S.C. § 1113(b)(1)(A). The  
2 proposal respecting pensions does not approach those requirements. ERISA violations to the  
3 detriment of Union employees must be considered in deciding if the proposal treats them, and the  
4 creditor Pension Funds, fairly and equitably.

5       **4.     The Norris-LaGuardia Act (“NLA”)**

6       Courts consistently have found that nothing in the language of section 1113, or any other  
7 part of the Bankruptcy Code, overrides the Norris-LaGuardia Act (“NLA”), 29 U.S.C. §§ 101-115.  
8 See, e.g., *In re Crowe & Assocs., Inc.*, 713 F.2d 211 (6th Cir. 1983) (vacating injunction against  
9 strike called to back up union's demand that employer pay into pension fund); *Briggs Transp. Co.*  
10 v. *Teamsters*, 739 F.2d 341 (8th Cir.) , cert. denied, 469 U.S. 917 (1984) (strike to protest rejection  
11 of collective bargaining agreement cannot be enjoined due to Norris-LaGuardia). The Briggs court  
12 rejected the argument that an injunction was a necessary adjunct to the power of bankruptcy court  
13 to authorize rejection, observing that “the parties have cited us to nothing in the Bankruptcy Code  
14 or its legislative history indicating a congressional intent to lift the jurisdictional restrictions of the  
15 Norris-LaGuardia Act.” *Briggs Transp. Co.* *supra*, 739 F.2d at 343.

16       The NLA expressly precludes federal injunctions against any “parties to a labor dispute,”  
17 29 U.S.C. § 104, except in narrowly defined conditions not found here.<sup>26</sup> A bankruptcy court or  
18 other federal court thus could not exercise injunctive power barring strikes or denying Union  
19 representation, under the Norris-LaGuardia Act.

20       The Rejection Motion itself implicates the NLA by seeking to impose a no-strike clause  
21 through the year 2020, an exercise that cannot be done without trenching upon the NLA provisions  
22 barring issuance of labor injunctions by a federal court.

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<sup>26</sup> One NLA precondition to issuance of an injunction is that police cannot be able to control the  
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1       **B. RESOLUTION OF THE REJECTION MOTION REQUIRES CONSIDERATION**  
2       **AND INTERPRETATION OF BANKRUPTCY AND NON-BANKRUPTCY**  
3       **FEDERAL LAWS, AND WITHDRAWAL OF REFERENCE IS MANDATORY**  
4       **THEREFORE UNDER 28 U.S.C. § 157(D)**

5              If resolution of the Rejection Motion “requires consideration” of both non-bankruptcy and  
6              bankruptcy federal law, withdrawal of the reference is mandatory under 28 U.S.C. § 157(d). Here  
7              there can be no doubt that such consideration is in fact required, as discussed above.

8              Withdrawal of reference is therefore mandatory under the second sentence of 28 U.S.C.  
9              § 157(d):

10             The district court shall . . . so withdraw a proceeding **if** the court  
11             determines that resolution of the proceeding requires consideration of  
12             both title 11 and other laws of the United States regulating organizations  
13             or activities affecting interstate commerce.

14             (Emphasis supplied.) In addition to bankruptcy issues under title 11 (the Bankruptcy Code), non-  
15             bankruptcy laws restricting the rights and obligations of parties to a collective bargaining  
16             agreement, as well as a potential successor employer, after the expiration and/or rejection of the  
17             collective bargaining agreement, must be considered to resolve the Rejection Motion to be  
18             withdrawn.

19             The Court must decide whether to withdraw a motion under Section 1113 of the  
20             Bankruptcy Code because of its effect on the rights and obligations of parties to the collective  
21             bargaining agreement under the NLRA, LMRA, ERISA, and the NLA, as discussed in the previous  
22             part of this Argument (Part A).

23             The Court must decide whether Section 1113 of the Bankruptcy Code can have any effect  
24             on the rights and obligations under the NLRA of parties to a collective bargaining agreement, as  
25             well as those respecting a potential successor employer following the sale now set for November 1.  
26             Successorship law requires consideration because § 1113 requires the Debtors’ proposals to be  
27             necessary to reorganization (which does not include the buyer) and that they treat creditors and  
28             affected parties “fairly and equitably,” (which requires considering the effect on the Unions).

29             The Debtors’ Rejection Motion would lure the Bankruptcy Court into resolving  
30             representational rights under the NLRA, which is clearly a matter assigned to the NLRB and

1 outside the bankruptcy court's authority. Debtors' proposed modifications of the Local 85 CBA  
2 include the deletion of the recognition of the Union as sole bargaining agent. Exhibit 4 to Debtors'  
3 Rejection Motion at 90 (Exh. 2 to Rich Decl. herein). Under this proposal, Vitafreeze would not  
4 recognize the Union, and therefore would have no obligation to bargain with the Union—similarly,  
5 Debtors' proposed removal of Article 1.3 language stating that joining the Union is "a condition of  
6 employment." Exhibit 5 Debtors' Rejection Motion at 123 (Exh. 2 to Rich Decl. herein). The  
7 Debtors have provided no justification whatsoever as to why these modifications are necessary,  
8 and they trench upon representation duties under the NLRA.

9       The NLRA and other federal labor laws mentioned need to receive substantial  
10 consideration to resolve the Rejection Motion.

11      C.     **THERE IS "CAUSE" FOR WITHDRAWAL OF THE REJECTION MOTION, SO  
12           THAT THIS COURT CAN ADDRESS WHICH FORUM HAS JURISDICTION  
13           OVER THE INTERTWINED ISSUES OF BANKRUPTCY LAW AND FEDERAL  
14           LABOR LAWS**

15       This Court has clear statutory authority to withdraw the reference "for cause shown," the  
16 so-called "permissive" withdrawal under 11 U.S.C. § 157(d) (first sentence):

17       The district court may withdraw, in whole or in part, any case where  
18 proceeding referred under this section, or on its own motion or on timely  
19 motion of any party for cause shown.

20       The strong concern for national uniform policy respecting federal labor law as set forth  
21 under the National Labor Relations Act makes withdrawal of reference appropriate. An Article III  
22 Court can appropriately order that application of federal labor law provisions concerning  
23 employers involved in interstate commerce are best heard by the NLRB.

24       This case calls for withdrawal of reference under the principles of *Security Farms v.*  
25 *International Brotherhood of Teamsters*, 124 F.3d. 999, 1008-09 (9th Cir. 1997). There, a lawsuit  
26 was removed to bankruptcy court on the eve of trial in state court against the Debtor, a local Union,  
27 and others. The district court withdrew the reference to interpret and apply the federal labor laws  
in tandem with bankruptcy law. There, as here, the case was non-core.<sup>27</sup>

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<sup>27</sup> The Rejection Motion is non-core because it does not concern administration of the bankruptcy  
estate property, nor does the Rejection Motion fit any other categories of core bankruptcy  
proceedings.

1  
2 Inasmuch as a bankruptcy court's determinations on non-core matters  
3 are subject to de novo review by the district court, unnecessary costs  
4 could be avoided by a single proceeding in the district court. . . . *In re*  
5 *Mann*, 907 F.2d 923, 926 (9th Cir. 1990). Furthermore, we reject the  
6 Growers' claim that the district court's decision encourages forum  
7 shopping.

8  
9 *Security Farms*, 124 F.3d at 1009; *see also Hanfling v. Epstein (In re ATG Catalytics)*, 2004 U.S.  
10 Dist. LEXIS 23617 (N.D. Cal. 2004) (withdrawal of reference of trustee's action alleging fraud,  
11 misrepresentation and breach of contract was appropriate and would enhance judicial economy  
12 because non-core issues pre-dominated).

13  
14 The saving in judicial economy will be substantial upon withdrawal of the reference of the  
15 Rejection Motion. See *Malone v. Norwest Financial California, Inc.*, 245 B.R. 389, 400 (E.D. Cal.  
16 2000). The alternative would be an appeal to the District Court of the Bankruptcy Court's order on  
17 the Rejection Motion, as well as filing various charges with the NLRB for conduct by the Hospital  
18 and/or Avanti in reliance of misguided inferences from the Bankruptcy Court's order on the  
19 Rejection Motion. Instead, this Court could determine in one proceeding the issues related to  
20 jurisdiction over the federal labor laws that control.

21  
22 Because the Debtors seek rejecting CBAs that a potential successor employer may not  
23 decide to assume, withdrawal will not upset bankruptcy practice, as a bankruptcy court is  
24 powerless to compel the buyer to assume the CBAs in any event. See *Malone*, 245 B. R. at 400  
25 ("no uniform bankruptcy practice to be disrupted"); *see also N.L.R.B. v. Burns Intern. Sec.*  
26 *Services, Inc.*, 406 U.S. 272 (1972); *New England Mech., Inc. v. Local Union 294*, 909 F.2d 1339,  
27 1342 (9th Cir. 1990) (successor employer is not bound by its predecessor's collective bargaining  
agreement). Withdrawal of reference is appropriate regarding bankruptcy-related cases where all  
parties have not consented to trial of the issue before the bankruptcy court.

28  
29 The Rejection Motion at issue concerns rights and obligations under federal labor laws that  
30 lie outside the jurisdiction of the Bankruptcy Court, and that fall within the exclusive jurisdiction  
31 of the NLRB, to a great extent. The District Court has jurisdiction to decide the extent to which  
32 the NLRB is the appropriate venue for NLRA application and interpretation. *See also Hanfling v.*

1 Epstein (In re ATG Catalytics), 2004 U.S. Dist. LEXIS 23617 (N.D. Cal. 2004) (withdrawal of  
2 reference of trustee's action against various defendants alleging fraud, misrepresentation, and  
3 breach of contract was appropriate and would enhance judicial economy because non-core issues  
4 pre-dominated).

5 This Court is also the court designated in statute to interpret and enforce collective  
6 bargaining agreements. See 29 U.S.C. § 185(a). Similarly, ERISA concerns must come to the  
7 District Court under various statutory provisions, including for vindication of rights respecting  
8 pension benefits, 29 U.S.C. § 1132, non-payment of employer contributions, 29 U.S.C. § 1145, and  
9 withdrawal liability applicable to an employer that leaves a multiemployer pension fund, 29 U.S.C.  
10 § 1381. The Rejection Motion involves consideration of all of these issues, because Debtors'  
11 willful violation of the CBAs in these areas precludes rejection of the CBAs under § 1113. See  
12 Birmingham Musicians' Protective Ass'n, Local 256-733 v. Ala. Symphony Ass'n (in Re Ala.  
13 Symphony Ass'n), 211 B.R. 65, 69 (N.D. Ala. 1996) ("this court finds persuasive the line of cases  
14 holding that a breach [] of the CBA is a violation of § 1113(f)"). Moreover, whether the Unions  
15 would have good cause not to accept proposed modifications that would in effect have ratified  
16 wholesale violations of the CBAs is a matter for determination on the Rejection Motion and should  
17 properly come to an Article III court that regularly enforces federal labor laws and pension rights.

18 Other strong jurisprudential grounds exist for withdrawal of the reference of the Rejection  
19 Motion. One such consideration is to avoid the danger of conflicting and inconsistent rulings, and  
20 to avoid the unnecessary labor and expenditure of resources to guard against inconsistency.  
21 Another consideration is avoidance of delay in determining the rights and obligations under the  
22 NLRA held by the Debtors, the Unions, as well as any potential buyer/successor employer, as such  
23 delay can result through sometimes unexpected turns of the bankruptcy process.

24 The strong concern national for uniform federal labor rights suggests withdrawal of  
25 reference. Since the Rejection Motion is not a core proceeding, orders by the Bankruptcy Court  
26 would be subject to de novo review by this Court. See 28 U.S.C. § 157(c)(1). The District Court is  
27 best equipped to deal with those issues of federal labor rights and federal jurisdiction. See Malone,

1 supra, 245 B.R. at 400. The reasons stated above provide ample “cause” for withdrawal of the  
2 reference of this Rejection Motion under 28 U.S.C. § 157(d).

## **VI. CONCLUSION**

4 For all of the reasons stated above, the undersigned, on behalf of the Movants in this action,  
5 the Unions, respectfully request this Court to withdraw its reference of the Rejection Motion, a  
6 contested matter, from the Bankruptcy Court.

7 | Dated: October 19, 2010

**WEINBERG, ROGER & ROSENFELD  
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